**DOUBLE ACRES SDN BHD**

**v.**

**TIARASETIA SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-116-99]
31 JULY 2000

***COMPANY LAW:*** *Directors - Liability - Liability for breach of contract by company - Whether confined to s. 132(1) Companies Act 1965 - Whether lifting of veil of incorporation necessary*

***CIVIL PROCEDURE:*** *Pleadings - Counterclaim - Bare allegations of fraud and conspiracy - Whether counterclaim struck out*

This was an appeal against the order of the Senior Assistant Registrar dismissing an application by one Teok Kian Seng ('TKS') to strike out the counterclaim of the defendant ('Tiara') against him. TKS was the second defendant named in the counterclaim.

The facts were that Tiara had employed the services of the plaintiff ('DASB') to develop a piece of land. TKS was the director of DASB. DASB entered into an agreement with another company called Puncakdana Sdn Bhd ('Puncakdana') to develop the said piece of land. Puncakdana then took a loan with MBf Finance Bhd for development purposes. Tiara claimed that TKS was personally liable for alleged breaches of contract by DASB with Tiara. Tiara also claimed for a sum of RM9 million which allegedly was an unauthorised drawdown of the said loan by the defendants named in the counterclaim. Apart from these, Tiara raised the issues of fraud and conspiracy.

**Held:**

**[1]** TKS was not personally liable for the breaches by DASB, if at all that breaches were to exist. As Tiara had cited DASB in its counterclaim, Tiara had no cause of action against TKS in his personal capacity. As a director of DASB, TKS duties and liabilities did not extend beyond the parameters of s. 132(1) of the Companies Act 1965.

**[2]** The parties to the MBf loan were Puncakdana and MBf Finance Bhd. It was therefore apparent that TKS had no say or control over the manner in which the MBf loan was operated. There was thus no necessity to lift the veil of incorporation of DASB. Even if the drawdown of RM9 million was unlawful, it was for MBf Finance Bhd to pursue the matter. Tiara

who was not the lender nor the borrower under the MBf loan was not entitled to bring a claim for the sum of RM9 million.

**[3]** Bare allegations were advanced by Tiara in regard to the issues of fraud and fraudulent misrepresentation. Tiara too failed to show how TKS orchestrated the alleged fraud and fraudulent misrepresentation.

**[4]** There was no agreement or arrangement among the defendants in the counterclaim to carry out an overt act detrimental to Tiara. Just like fraud, conspiracy too must be particularised in the counterclaim so that the opposite party would not be caught off guard. Incidentally, in Tiara's affidavits the particulars of conspiracy were not itemised at all.

**[5]** Tiara failed not only to plead but also to prove how the defendants had conspired among themselves to intentionally injure Tiara. There was also a failure to show how Tiara had suffered as a result thereof.

**[6]** TKS had demonstrated conclusively from the relevant affidavits and the supporting documents thereto that Tiara's allegations were mischievous, irrelevant and totally unsustainable against him.

*[Appeal allowed.]*

**Case(s) refered to:**

*Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors [1997] 3 MLJ 661* ***(refd)***

*Aspatra Sdn Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97* ***(refd)***

*Amon v. Bobbett [1889] 22 QBD 548* ***(refd)***

*Baylis Baxter v. Sabath [1958] 2 All ER 209* ***(refd)***

*Beddall v. Maitland [1881] 17 ChD 181* ***(refd)***

*Bow Maclachlan & Co v. The Camosun [1909] AC 597* ***(refd)***

*Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No 3) [1970] Ch 506* ***(refd)***

*Chang Lee Swee v. PP [1985] 1 MLJ 75* ***(refd)***

*Counterclaim (Chuan Hup Agencies Pte Ltd v. Global Minerals (Sarawak) Sdn Bhd) [1990] 1 MLJ 305* ***(refd)***

*CSI International Co. Ltd v. Archway Personnel (Middle East) Ltd [1980] 3 All ER 215* ***(refd)***

*Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1986] 1 MLJ 105* ***(refd)***

*Dyson v. Attorney-General [1911] 1 KB 419* ***(refd)***

*Straits & Island General Insurance Sdn Bhd v. Lawrence Chung Hee Menn [1991] 2 CLJ 1024* ***(refd)***

*Byrne v. Baker [1964] VR 443* ***(refd)***

*Derry v. Peek [1889] 14 App Cas 337* ***(refd)***

*Drummond-Jackson v. British Medical Association [1970] 1 All ER 1094* ***(refd)***

*Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847* ***(refd)***

*Gilford Motor Co Ltd v. Horne [1933] Ch 935* ***(refd)***

*H Abdul Shukoor v. E Mohamed Kassim [1927] SSLR 67* ***(refd)***
*Hock Hua Bank (Sabah) Bhd v. Lam Tat Ming & Ors [1995] 4 MLJ 328* ***(refd)***
*Inter-Ocean Trading (Pte) Ltd v. Selco (Singapore) (Pte) Ltd [1983] 1 CLJ 105* ***(refd)***
*Intraco Ltd v. Multi-Pak Singapore Pte Ltd [1995] 1 SLR 313* ***(refd)***
*Janagi v. Ong Boon Kiat [1971] 2 MLJ 196* ***(refd)***
*Jones v. Lipman [1962] 1 WLR 832* ***(refd)***
*Kepong Prospecting Ltd v. Schmidt [1968] 1 MLJ 170* ***(refd)***
*Lai Ah Kau & Anor v. PP [1988] 3 MLJ 391* ***(refd)***
*Lee Guat Eng v. Seet Tiam Hock [1974] 1 MLJ 178* ***(refd)***
*Lee Nyen Choi v. Voon Noon [1979] 2 MLJ 28* ***(refd)***
*Lim Koei Ing v. Pan Asia Shipyard & Engineering Co Pte Ltd [1995] 1 SLR 499* ***(refd)***
*Lum Sow Kuen v. Chuah Choong Heong & Ors [1998] MLJ 39* ***(refd)***
*Marchesi v. Barnes [1970] VR 434* ***(refd)***
*MAA Holdings Sdn Bhd & Anor v. Ng Siew Wah & Ors [1986] 1 MLJ 170* ***(refd)***
*Mohamed Din Ali v. The Trustees of the Negri Sembilan Scholarship Fund for Higher Education and Training of Malays [1958] 24 MLJ 19* ***(refd)***
*MS & LRy and L & NW Ry v. Brooks [1877] 2 Ex D 243* ***(refd)***
*Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 MLJ 62* ***(refd)***
*Pengiran Othman Shah Pengiran Mohd Yusoff v. Karambunai Resorts Sdn Bhd [1996] 1 MLJ 309* ***(refd)***
*Permodalan Plantation Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 MLJ 160* ***(refd)***
*Pioneer Concrete Services Ltd v. Yelnah Pty Ltd [1986] 11 ACLR 108* ***(refd)***
*Price v. Easton [1833] 4 B & Ad 433* ***(refd)***
*Re City Equitable Fire Insurance Co [1924] All ER Rep 485* ***(refd)***
*Re Duomatic Ltd [1969] 2 Ch 365* ***(refd)***
*Re Ena Jainab Abdeen [1930] SSLR 212* ***(refd)***
*Re Smith & Fawcett Ltd [1942] Ch 304* ***(refd)***
*Re Securitibank Ltd (No 2) [1978] 2 NZLR 136* ***(refd)***
*See Hua Daily News Bhd v. Tan Thien Chin & Ors [1986] 2 MLJ 107* ***(refd)***
*Salomons v. Knight 8 TLR 472* ***(refd)***
*Straits & Island General Insurance Sdn Bhd v. Lawrence Chung Hee Menn [1991] 2 CLJ 1024* ***(refd)***
*Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529* ***(refd)***
*Suppuletchimi v. Palmco Bina Sdn Bhd [1994] 2 MLJ 368* ***(refd)***
*Tan Guan Eng v. Ng Kweng Hee [1992] 1 MLJ 487* ***(refd)***
*Tan Sri Tan Hian Tsin v. PP [1979] 1 MLJ 73* ***(refd)***
*Tara Rajaratnam v. Datuk Jagindar Singh & Ors [1983] 2 MLJ 127* ***(refd)***
*Tay Choo Wah v. PP [1976] 2 MLJ 95* ***(refd)***
*Tengku Abdullah ibni Sultan Abu Bakar v. Mohd Latiff Shah Mohd [1996] 2 MLJ 265* ***(refd)***
*The Chartered Bank v. Yong Chan [1974] 1 MLJ 157* ***(refd)***
*Tio Chee Hing & Ors v. Government of Sabah [1981] 1 MLJ 207* ***(refd)***
*Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 PC* ***(refd)***
*Tweddle v. Atkinson [1861] 1B* ***(refd)***
*Wallersteiner v. Moir, Moir v. Wallersteiner and Others [1974] 3 All ER 217* ***(refd)***

*Williams v. Agius [1914] AC 522* ***(refd)***
*Ye Yu @ Ye Kim Onn v. Joseph Raymond Morais [1984] 2 CLJ 126* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 132(1), 132(5), 354
Contracts Act 1950, ss. 10, 14, 17, 18(b)
Penal Code, s. 409
Rules of the High Court 1980, O. 14 r. 5, O. 15 rr. 2, 5(2), O. 18 rr. 18, 19, O. 19 r. 8, O. 20 r. 3, O. 21 r. 2(b), O. 22 r. 6, O. 28 r. 7

*For the plaintiff in the counterclaim (Tiara) - Toh Su Lin; M/s SB Cheah & Assoc*
*For the 2nd defendant in the counterclaim (TKS) - Chow Siew Lin; M/s Chow & Assoc*

*Reported by Usha Thiagarajah*

**JUDGMENT**

**Abdul Malik Ishak J:**

**Introduction**

By way of a summons in chambers in encl. 18, Teok Kian Seng, the second defendant named in the counterclaim, pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ("RHC") sought for the following orders:

(a) That the counterclaim of Tiarasetia Sdn Bhd (hereinafter referred to as "Tiara") dated 22 March 1999 be struck out on the grounds that:

(i) it is scandalous, frivolous or vexatious; and/or

(ii) it may prejudice, embarrass or delay the fair trial of the action; and/or

(iii) it is otherwise an abuse of the process of the court.

(b) In the alternative, the counterclaim of Tiara be struck out pursuant to the inherent jurisdiction of this Honourable Court;

(c) Costs of this application and costs of Teok Kian Seng (hereinafter referred to as "TKS") for defending Tiara's counterclaim be forthwith paid by Tiara to TKS; and

(d) Such other relief or further order which this honourable court deems fair and fit to grant.

Enclosure 18 was supported by an affidavit affirmed by TKS on 14 June 1999 and filed on the same date as seen in encl. 17. Tiara's affidavit in reply was affirmed by Mohd Yusof bin Abu Othman on 3 May 1999 and filed also on

the same date as reflected in encl. 8. Tiara's further affidavit in reply that was affirmed by the same deponent on 23 June 1999 was also filed on the same date as seen in encl. 19. Again, Tiara's affidavit in reply affirmed by the same deponent on 23 June 1999 and filed on the same date can readily be seen in encl. 20. Finally, TKS's second affidavit in support of encl. 18 was affirmed on 15 July 1999 and filed on the same date as can be seen in encl. 23.

On 15 October 1999, the senior assistant registrar ("SAR") heard encl. 18 and forthwith dismissed it with costs. Being aggrieved, TKS filed an appeal to the judge in chambers on 20 October 1999 as seen in encl. 29.

**Facts**

The writ of summons and the statement of claim of Double Acres Sdn Bhd (hereinafter referred to as "DASB") against Tiara were filed on 24 February 1999 as seen in encl. 1. The statement of defence and counterclaim of Tiara in encl. 4 were filed on 22 March 1999. DASB's reply and defence to the counterclaim were filed on 2 April 1999 as seen in encl. 7 and not encl. 5 as suggested.

Tiara's counterclaim brought into the picture not only DASB as the first defendant but also TKS as the second defendant and Puncakdana Sdn Bhd (hereinafter referred to as "Puncakdana") as the third defendant. TKS's defence to the counterclaim as seen in encl. 11 was filed on 4 May 1999. Puncakdana too filed the defence to the counterclaim in encl. 12 on 19 May 1999. Now, since encl. 18 revolved on TKS's application to strike out Tiara's counterclaim, I shall confine this judgment to the counterclaim.

In the counterclaim, Tiara described TKS as the director of DASB. It was averred that on 10 April 1997, DASB entered into an agreement with Puncakdana (hereinafter referred to as "Puncakdana JV agreement") to develop a piece of land held under H.S. (M) 9418, P.T. No. 12595, Kelana Jaya, Mukim of Damansara, State of Selangor (hereinafter referred to as the "property"). DASB was engaged as the contractor by Tiara to develop the said property pursuant to the construction agreement. It was said that, at all material times,Tiara was not aware of the terms and conditions of Puncakdana JV agreement because copies of the agreement were not extended to Tiara by DASB and TKS. Despite repeated requests for a copy of the Puncakdana JV agreement, both DASB and TKS refused to oblige. On 22 January 1999, after Tiara had launched intensive investigations the Puncakdana JV agreement was finally made available to Tiara. It was averred that DASB, as evident from the terms of the Puncakdana JV agreement, made several fraudulent misrepresentations and the particulars of that fraud were listed in this fashion:

(a) By cl. 2(e) of the Puncakdana JV agreement, DASB and TKS misrepresented that Tiara had agreed to the granting of a "general and unrestrictive power of attorney " to DASB.

(b) By cl. 4(b) of the Puncakdana JV agreement, DASB and TKS had fraudulently or without due regard for the whole truth, misrepresented that DASB was not in breach of any terms, conditions and/or obligations of the construction agreement.

(c) By cl. 4(m) of the Puncakdana JV agreement, DASB and TKS fraudulently misrepresented that, at the material time, they both had the legal title and/or interest in block "C" and that both of them had the authority to agree to the negative covenant stipulated therein.

(d) By cl. 4(o) of the Puncakdana JV agreement, both DASB and TKS fraudulently implied that they had already obtained the said agreement from Tiara in order to execute a letter in the form as exhibited in appendix VI(a) thereof.

(e) By cl. 4(o) of the Puncakdana JV agreement and appendix VI(a) that was annexed thereto, both DASB and TKS fraudulently misrepresented that Tiara was aware of the Puncakdana JV agreement.

It was said that on 27 November 1998, DASB had entered into an agreement with Puncakdana (hereinafter referred to as the "Supplementary Puncakdana JV agreement") and it was also said that Tiara was not aware of the existence of this very agreement. Now, by the terms of the Supplementary Puncakdana JV agreement it was pointed out that both DASB and TKS had made several fraudulent misrepresentations. The particulars of the fraud were listed in these ways:

(a) By cl. 2 of the Supplementary Puncakdana JV agreement, the term "first party's Lots" was defined to mean and to refer to "parcels A, B, C, D, E, F and all other lots, reserves etc outside parcel C but within Lot 2450." For these reasons, it was said that both DASB and TKS had fraudulently misrepresented that under the construction agreement, they were entitled to all the property as defined in the "first party's lots".

(b) By cl. 3.4.2 of the Supplementary Puncakdana JV agreement, both DASB and TKS fraudulently misrepresented that DASB had the right to vary the consent if Tiara in any drawdown of the loan granted by MBf Finance Bhd (hereinafter referred to as the "MBf loan"). It was emphasised that this very clause must be contrasted with cl. 16.1.7 of the construction agreement.

(c) By cl. 3.4.3 of the Supplementary Puncakdana JV agreement, both DASB and TKS misrepresented that DASB's consent need only be obtained prior to any release or drawdown of the MBf loan which was contrary to the provisions of cl. 16.1.7 of the construction agreement.

It was averred that the *modus operandi* of the fraud perpetrated by both DASB and TKS in collusion with Puncakdana to drawdown the loan from the MBf loan was without the consent of Tiara and this was apparent from the conduct of all the three defendants. TKS represented to Tiara that DASB required a bridging loan for the purpose of the project. But somehow, it was said that both DASB and TKS arranged its affairs in such a way that the loan was extended to Puncakdana – its partner in the Puncakdana JV agreement. The bridging loan was said to be in the region of RM68 million. It was upon the misrepresentation of DASB and TKS to the effect that adequate security would be provided for in accordance with cl. 16.1.7 of the construction agreement that prompted Tiara to consent to the creation of a third party charge. Had it not been for that kind of representation, Tiara would not have agreed to create a third party charge. It was averred that, at all material times, the three defendants were aware of the specific terms and conditions governing the drawdown of the bridging loan granted by the MBf loan scheme. On 13 August 1997, Puncakdana wrote to the MBf Finance Bhd, to this effect (see encl. 19, exh. "MY 4"):

PUNCAKDANA SDN BHD

13th August 1997

MBf FINANCE BERHAD
17TH Floor, Plaza MBf
Jalan Ampang
50450 Kuala Lumpur

Dear Sirs

**LOAN FACILITIES OF RM68.0 MILLION – OPERATIONS OF THE ACCOUNT**

Please be informed that drawdown on the facility of RM68.0 million granted to us is to be operated in the following manner;

a) Tranche A – Term Loan of RM15.0 million

(1) The First RM5.0 million - RM.3 million is to be made payable to the land office, towards payment of the premiums to the said Parcel C of the lands.

- RM3.7 million is to be deposited in the Project Development Account to be utilised to preliminaries and expenses in relation to the loan/ project/expenses incurred by Double Acres Sdn Bhd.

- Further drawings on this amount (as) deposited into the Project Development Account is to (be) supported by document acceptable to MBf Finance Berhad, and as per the Resolutions for the operations of the said PDA Account.

2) The next RM10.0 million - Up to RM10.0 million drawings is to be utilised towards expansion of the project. Drawings on this account is to be supported by all relevant documents acceptable to MBf Finance Finance Berhad

And

a certificate of consent to be issued by Tiara Setia Sdn Bhd in the form and context as per attachment.

b) Tranche B – Financial Guarantee of RM18.0 million

Issuance on the Financial Guarantee facility shall be on (advice) from us and upon compliance with all conditions to the loan. The issuance of Financial Guarantee is also to be supported by a certificate of consent from Tiara Setia Sdn Bhd.

c) Tranche C – Bridging Loan of RM35.0 million

On submission of Architect Certificate of Workdone, supported by a request to drawdown by us and by a letter of consent from Tiara Setia Sdn Bhd.

The aforesaid arrangements for drawdown shall remain irrevocable and valid unless otherwise advised in writing to you, (advice) of which shall be duly endorsed by all parties (concerned).

Thank you.

Yours faithfully
PUNCAKDANA SDN BHD
Sgd: Illegible
...

It was averred that Tiara had not agreed to a change in the manner of the drawdown of the loan facilities and no notification was ever received of any intended change of the terms of the drawdown. It was also averred that all the three defendants had by the Supplementary Puncakdana JV agreement purported to alter the mandate for the drawdown by the loan since by cll. 3.4.2 and 3.4.3 thereof the consent was to be given by DASB instead of by Tiara and this was said to be in direct contravention of the express terms of Puncakdana's letter dated 13 August 1997. It was averred that DASB and TKS had fraudulently substituted the certificate of consent of Tiara with that of

DASB. Arising out of those fraudulent acts alluded to earlier, all the defendants then proceeded to withdraw moneys from the bridging loan and had, to date, unlawfully and fraudulently withdrew approximately RM9 million without the consent of Tiara.

Once Tiara discovered the fraudulent drawdown of the said loan, it launched investigations and made enquiries with MBf Finance Bhd and the defendants. It was averred that, at all material times, TKS and the directors of Puncakdana admitted to having withdrawn the loan without the consent of Tiara. This admission was expressly made at a meeting convened by Yayasan Selangor at Wisma Yayasan Selangor on 16 March 1999. It was categorically averred that the defendants have in fact admitted that the drawdown was made pursuant to the consent of DASB. It was also averred that the drawdown of RM9 million was made without the consent of Tiara and this was confirmed by the chief executive officer of MBf Finance Bhd, one Mr. Low Ngiap Jin on 13 February 1999. It seemed that Tiara knew and had knowledge that subsequent to the drawdown of RM9 million, Puncakdana quarrelled with DASB and TKS. It was because of this dispute that Tiara was able to obtain further and better particulars of the fraud that had been perpetrated. That dispute was clearly evident from the three letters written by Puncakdana dated 28 January 1999 addressed to DASB, the other letter dated 29 January 1999 addressed to Yayasan Selangor and, finally, a letter dated 30 January 1999 addressed to DASB. It was averred, rather interestingly, that by letter dated 30 January 1999, Puncakdana accused TKS of fraudulent misrepresentation. That accusation contained in that letter was strongly worded and it was worded in this manner (see encl. 19, exh. "MY 6"):

PUNCAKDANA SDN BHD

30th January 1999
Double Acres Sdn Bhd
No. 8, Lorong Tiara 1A
Bandar Baru Klang
41150 Klang

Dear Sir,

**RE: PUNCAK SERI KELANA PROJECT**

We refer to the above matter and also to Tiara Setia Sdn Bhd's ("Tiara Setia") letter dated 29.1.99. A copy is enclosed for your perusal.

We are indeed shocked and surprised by the contents of Tiara Setia's letter. At all material time(s) you failed to inform us of the seriousness of your problem(s) with Tiara Setia.

Your Mr. Andrew Teok have instead led us into believing that – *a*

1. Yayasan Selangor has been applying a lot of pressure on Tiara Setia owing to their failure to pay Yayasan Selangor any money under their Joint Venture Agreement dated 7.3.95.

2. By reason aforesaid, your Mr. Andrew Teok insisted that we pay you a sum of RM6.5 million from our term loan account with MBF Finance Bhd. Your Mr. Andrew Teok further informed our Mr. Hwang that Yayasan Selangor has recently purchased a premise for their hostel and a sum of RM10 million is required for partial payment of the purchase price. *b*

3. Your Mr. Andrew Teok informed our Mr. Hwang that the said sum of RM6.5 million is to be paid to Yayasan Selangor for the above purchase. *c*

4. In view that this sum of RM6.5 million is to be paid to Yayasan Selangor for the above purpose, we agreed to the same and the same was put in our Supplemental Agreement dated 27.11.98. *d*

5. We have been informed by MBF Finance Bhd that the above sum of RM6.5 million has been paid into your account over a period of several weeks.

6. We have in good faith believed your Mr. Andrew Teok on the above story and have also in good faith believed that Tiara Setia is aware of this payment. If we had known the seriousness of the problem, we would not have agreed to the disbursement of the sum of RM6.5 million to you until the same is settled. *e*

We are still in the dark as to what your problems are with Tiara Setia. Up to 25.1.99, you have failed to inform us of the existence of any serious problem. Even on 25.1.99 your Mr. Andrew Teok merely mentioned that there was a problem and that you will be having a meeting with Tiara Setia on 27.1.99. *f*

When asked by our Mr. Hwang you refused to divulge the problem. According to Tiara Setia's letter, the problem is not only a problem BUT is one which affects our entire project. *g*

We are indeed extremely disappointed with your Mr. Andrew Teok's attitude to our joint venture.

Notwithstanding the economic downturn, we continued to take the initiative to proceed with the project even at a nominal profit. This is also to enable us to generate sufficient cash flow to meet our obligations under our joint venture agreement. We informed you that with our proposed development from commercial to residential, the original purchase price of RM 79 million was too high and that you should consider giving us a discount. *h*

*i*

a For record purpose(s), we are entitled to the 25% reduction in the purchase price, that is, from RM79 million to RM59.25 million by reason of the drop in the plot ratio from 4 to 3. You reluctantly agreed to a mere 10% discount AND SUBJECT to conditions.

b To date, the development on your other parcels have not even taken off. If we have not taken the decision to develop residential units, the entire 87.7 acres will still be in its original state. This is despite the fact that Yayasan Selangor signed the Joint Venture Agreement on 7.3.95.

In view of Tiara Setia's letter, we want a confirmation from you by 12 pm on 2.2.99 that the said RM6.5 million has been paid to either :

c

1. Tiara Setia Sdn Bhd for their onward transmission to Yayasan Selangor; or

2. Yayasan Selangor direct.

d In the event you have not paid the said sum of RM6.5 million to either party mentioned above, we hereby demand the refund of the RM6.5 million by 12 pm on 3.2.99 failing which, we have no other alternatives but to pursue such course of actions we deem fit to protect our interests in the above project and in the said sum of RM6.5 million.

e If we do not hear from you by 12 pm on 3.2.99, then we shall deem that :

(i) you have failed to pay the sum of RM6.5 million to either party mentioned above; and

(ii) you hold the sum of RM6.5 million as our trustee until the same is fully repaid to us.

f Yours faithfully,

PUNCAKDANA SDN BHD
Sgd: Illegible
NORDIN AB GHANI
g Director

c.c. Yayasan Selangor - Attn: YBhg Dato' Hj Zorkarnain Bin Abdul Rahman

Tiara Setia Setia Sdn Bhd - Fax No. 03-5505799

h But somehow, Tiara had yet to receive the sum of RM6.5 million from either DASB or TKS. At a meeting on 15 March 1999 Yayasan Selangor confirmed, in the presence of all the three defendants, that they too had not received the sum of RM6.5 million from either DASB or TKS. By way of mitigation and to water down the said fraud, TKS as a director of DASB offered to repay
i the said sum but on condition that the construction agreement which was

terminated by Tiara be reinstated. But Tiara refused to reinstate the construction agreement. Tiara averred that notwithstanding the allegations by Puncakdana against DASB and TKS, the fact remained that, at all material times, all the defendants knew that the drawdown of the monies from the bridging loan was unlawful and without the consent of Tiara. It was averred that all the defendants had conspired to change the terms of the drawdown without notifying Tiara as was required under the terms of the letter dated 13 August 1997. In fact, so it was averred, that by a letter dated 2 August 1997, DASB and TKS made the pertinent representations and undertakings to Tiara and with the collusion of Puncakdana they conspired to injure Tiara in its business and obtained RM9 million by fraudulent means. It was averred that Puncakdana, at all material times, was aware that Tiara had entered into a joint venture agreement with Yayasan Selangor. When Puncakdana had its dispute with DASB and TKS, Puncakdana with the intention of inducing Yayasan Selangor to sever its joint venture with Tiara wrote letters disparaging Tiara. Puncakdana had no privity of contract with either Tiara or Yayasan Selangor and yet Puncakdana chose to communicate with Yayasan Selangor pertaining to its dispute with DASB and TKS without due regard to the interest of the plaintiff. It was said that representations were also made to the Menteri Besar of Selangor to intervene and to assist. It was averred that the statements concerning Tiara were entirely false and it was calculated to injure Tiara.

It was due to the matters as aforesaid, that Tiara had suffered loss and damage. It was said that the damage suffered by Tiara as to its reputation and goodwill was irreparable and this was entirely due to the actions of the defendants herein. It was averred that unless restrained by an injunction, the defendants would continue to injure Tiara. For these reasons, Tiara counterclaimed against the defendants for:

(a) The sum of RM9 million;

(b) Interest thereon at such rate as the court deems fit from the date of the drawdown to the date of full payment;

(c) General damages to be assessed;

(d) An injunction against the defendants from operating the bridging loan account or such other accounts as was secured by the third party charge;

(e) An injunction to restrain the defendants, their agents and/ or servants from communicating with Yayasan Selangor with the intention of disparaging Tiara and/or to induce a breach of contract between Yayasan Selangor and Tiara;

(f) Costs of the suit; and

(g) Such other reliefs as the court deems fit.

To summarise, Tiara raised the following issues in its counterclaim:

(1) That DASB had breached the terms and conditions of the construction agreement.

(2) That Tiara was not aware of the terms and conditions of the Puncakdana JV agreement and that DASB and TKS made several fraudulent misrepresentations arising out of that agreement.

(3) That Tiara was not aware of the terms and conditions of the Supplementary Puncakdana JV agreement and that DASB and TKS made several fraudulent misrepresentations arising out of the agreement.

(4) That the *modus operandi* of the fraud perpetrated by DASB and TKS in collusion with Puncakdana had caused the drawdown of the sum of RM9 million and that drawdown was without the consent of Tiara.

(5) That Puncakdana had a dispute with DASB and TKS and Puncakdana had accused TKS of fraudulent misrepresentation.

(6) That Puncakdana had communicated with Yayasan Selangor with the sole intention of disparaging Tiara and had made a false statement calculated solely to injure Tiara.

I will now proceed to examine the defence of TKS to Tiara's counterclaim. Briefly, it may be stated in this way. TKS averred that the Puncakdana JV agreement was executed between DASB and Puncakdana and it did not concern TKS at all. TKS averred that he has no knowledge of the execution of the Puncakdana JV agreement due to his position as a director of DASB. TKS also denied that he made the alleged or any fraudulent misrepresentation or fraud to Tiara. It was also said that Tiara was not a party to the Puncakdana JV agreement and was thus not privy to it. By way of an alternative, TKS stated that there was no agreement be it oral or otherwise between Puncakdana and TKS and that TKS was not a party to the Puncakdana JV agreement and the Supplementary Puncakdana JV agreement. In addition to that, it was said that TKS had not at any time acted in his personal capacity and that all acts done were done for the benefit of DASB.

TKS denied that there was any fraudulent misrepresentation. TKS also denied that the alleged or any representation (which was denied), was made with the intention of inducing Tiara to consent to the creation of a third party charge in favour of MBf Finance Bhd. Tiara had executed the third party charge on its own free will with the full knowledge and understanding of the transaction. According to TKS it was always made clear between Tiara, DASB and Puncakdana that any loan was to be obtained by the latter. By way of an

alternative, TKS stressed that the transaction as to the loan granted by MBf Finance Bhd to Puncakdana and as to how that loan was to be operated upon was a matter purely between MBf Finance Bhd and Puncakdana. In regard to the issue of Puncakdana JV agreement and the averment that Tiara was not aware of its terms and conditions and that Tiara only managed to obtain a copy of that agreement on 22 January 1999, TKS categorically stated that these were strictly matters between MBf Finance Bhd, Puncakdana and Tiara and TKS put Tiara to strict proof thereof. TKS also denied that he had fraudulently substituted the certificate of consent of Tiara and/or unlawfully and fraudulently withdrew approximately RM9 million without the consent of Tiara and TKS categorically put Tiara to strict proof thereof. TKS further stated that the certificate of consent was given in accordance to the Supplementary Puncakdana JV agreement entered into between DASB and Puncakdana and TKS said that it had nothing to do with him personally or in his personal capacity. In regard to the meeting that was held on 15 March 1999, TKS said that he attended the meeting as a director for and on behalf of DASB. In regard to the discovery of the fraudulent drawdown of the loan as alluded to in para. 33 of the counterclaim, TKS put Tiara to strict proof thereof. TKS also denied Tiara's allegations in paras. 34 and 35 of the counterclaim in regard to the drawdown of RM9 million but admitted as to the three letters that were written by Puncakdana to DASB, Yayasan Selangor and DASB. TKS's stand was quite simple and categorical. TKS emphasised that:

(1) at all material times, TKS had acted as a director for and on behalf of DASB and whatever acts that were done were done for the benefit of DASB;

(2) there was no personal contract between TKS and Puncakdana;

(3) any representation made to Puncakdana was not made in TKS's personal capacity and any such representation was made based on information given and/or represented by Tiara; and

(4) that the letter dated 30 January 1999 emanating from Puncakdana was a correspondence exchanged between DASB and Puncakdana only and in no way did it concern any other party including Tiara; and in addition thereto DASB had replied to Puncakdana's letter.

In regard to the letter dated 30 January 1999 wherein it was said that Puncakdana had accused TKS of fraudulent misrepresentation which was alluded to in para. 36 of the counterclaim, TKS had this to say by way of a reply:

(1) that TKS had attended the meeting on 15 March 1999 as a director of DASB;

(2) that TKS denied admitting to any fraud or offering to refund any money whether in his personal capacity or as a director of DASB; and

(3) that TKS also denied ever imposing any condition in regard to the reinstatement of the construction agreement.

In regard to Tiara's allegations as set out in paras. 37 to 39 of the counterclaim, TKS categorically said that those allegations were misconceived and baseless and put Tiara to strict proof thereof. TKS categorically stated that:

(1) in his capacity as a director of DASB and not in his personal capacity, TKS had signed the relevant documents in regard to the loan when he was requested by Puncakdana for the drawdown of the monies under the said loan for the benefit of Puncakdana and thereby fulfilling DASB's obligations;

(2) that the drawdown of monies from the said loan was strictly transaction made between Puncakdana and MBf Finance Bhd and that TKS had no control over the terms of the said loan;

(3) that the sum of RM9 million was not received by him in his personal capacity and TKS also denied conspiring with any party to injure Tiara in its business ventures; and

(4) that the sum of RM 9 million was not obtained by fraudulent means.

TKS denied being indebted to Tiara in the sum of RM9 million or any part thereof and TKS too denied being liable to pay interest accruing thereto. TKS further denied that Tiara had suffered the alleged or any damage. TKS further stated that Tiara's application for an injunction against TKS was totally misconceived, scandalous and/or frivolous bearing in mind that TKS was not a party to all the transactions in respect of the loan account or such other accounts as secured by the charge thereof. TKS averred that he had no say nor control over those accounts as he was not the borrower thereto.

By way of an alternative, TKS stated that there were no facts to show that there was communication between Yayasan Selangor and TKS in order to disparage Tiara and/or to induce severance of Yayasan Selangor's joint venture with Tiara. For the aforesaid reasons, the stand of TKS was simple: that Tiara's purported counterclaim for the sum of RM9 million was scandalous, frivolous or vexatious and was made with a calculated view to prejudice, embarrass and/or delay the fair trial of the action and was otherwise an abuse of the process of the court. Further or in the alternative, it was averred that

since Tiara had no entitlement to the sum of RM9 million drawdown under the said loan account, then that counterclaim was said to tantamount to attempting to unjustly enrich itself. Further and by way of an alternative, TKS averred that Tiara's counterclaim was scandalous, frivolous or vexatious and was an abuse of the process of the court because all acts done by TKS were done not in his personal capacity but rather on behalf of and by virtue of being a director of DASB. Further and also by way of an alternative, TKS averred that since DASB was being sued in the counterclaim, this meant that Tiara had no cause of action against TKS in his personal capacity. Save as to what was admitted therein, TKS denied each and every allegation contained in the counterclaim as if the same were set forth herein and specifically traversed seriatim. TKS then prayed that Tiara's counterclaim be dismissed with costs.

I have purposely selected a tedious route by narrating the facts in some detail. But I must categorically say that the relevant, and germane undisputed facts may be stated in these terms:

(1) TKS was not a party to any of the agreements as alluded to above.

(2) Tiara was not a signatory to the Puncakdana JV agreement as well as the Supplementary Puncakdana JV agreement.

(3) Puncakdana was the borrower and MBf Finance Bhd was the lender under the MBf loan. The sum of RM9 million was money drawdown under the MBf loan.

(4) Security documents, including a third party charge over block "C" had been executed by Tiara as attorney for Yayasan Selangor.

The affidavit in encl. 17 adverted to the same set of facts as alluded to above. It emphasised that Puncakdana obtained a loan from MBf Finance Bhd to finance the development of block "C" and that Tiara had executed a charge over block "C" to and in favour of MBf Finance Bhd for the purposes of the MBf loan. It was also emphasised that TKS was not a party to the construction agreement, the Puncakdana JV agreement and the Supplementary Puncakdana JV agreement. Tiara too was not a party to the Puncakdana JV agreement and the Supplementary Puncakdana JV agreement. Emphasis was also made to the effect that the transactions as to the MBf loan and how that loan was to be operated were strictly matters between MBf Finance Bhd and Puncakdana – the lender and the borrower of the said loan. TKS also denied receiving RM9 million in his personal capacity and he too denied conspiring with any party to injure Tiara in its business ventures. TKS too denied obtaining RM9 million by fraudulent means. Three exhibits were annexed to encl. 17

and they all related to the agreements, namely, exh. "TKS1" relating to the agreement between Tiara and DASB for the development of the property, exh. "TKS 2" in relation to Puncakdana JV agreement, and exh. "TKS3" relating to the Supplementary Puncakdana JV agreement.

Enclosure 8 revolved on the facts in order to disqualify Tiara's solicitors, namely, Messrs Azri Chuah & Yap on the ground that Mr. Chuah Thiam Ming will be a witness in regard to the wrongdoings of TKS.

Enclosure 19 was a paragraph by paragraph reference to the counterclaim. It averred, *inter alia*, that if every solicitor in Malaysia who attended meetings with their clients in the presence of opposing parties were considered potential witnesses, then it was said that no lawyer can ever represent their clients in any meetings or negotiations. Certain exhibits were annexed to put to rest the issue of whether the monies were drawdown without the consent of Tiara in the counterclaim and these exhibits were:

(1) a letter dated 13 August 1997 from Puncakdana in the counterclaim to MBf Finance Bhd marked as exh. "MY 4".

(2) a letter dated 2 August 1997 from DASB in the counterclaim admitting and agreeing that the consent of Tiara in the counterclaim was necessary in any drawdown from the credit facilities provided by MBf Finance Bhd and this letter marked as exh. "MY 5".

(3) a letter dated 30 January 1999 from Puncakdana to DASB in the counterclaim marked as exh. "MY6".

(4) a letter dated 10 February 1999 to MBf Finance Bhd which was marked as exh. "MY7".

(5) a police report dated 11 March 1999 regarding the unlawful drawdown of the monies as seen in exh. "MY8" of encl. 19.

It was averred that the exhibits adverted to above showed that the deponents in support of encls. 6 and 14 have not been truthful and have embarked on a scheme to mislead the court and to abuse the process of the court with the intention of denying Tiara of the services of a senior counsel.

It was averred in encl. 20 that the counterclaim was intricately interwoven with the averments as set out in the defence. Since there was no application to strike out the defence of the defendants to the counterclaim, it was averred, quite rightly, that Tiara had conceded that the defence to the counterclaim had raised triable issues and that these issues cannot be determined summarily. It was averred that the exhibits annexed to the affidavits of TKS together with the exhibits annexed to the affidavits of Tiara, clearly showed that the defence

and the counterclaim were grounded on undisputed facts and it gave rise to several causes of actions, *inter alia*, damages for breaches of contract and fraud and that it cannot be said that the pleadings, supported by affidavit evidence and the exhibits thereto were frivolous, vexatious and an abuse of the process of the court. It was also averred that fraud and misrepresentation can be committed by a person both in the capacity as a director of a company and in his personal capacity and that it cannot be said without more that TKS was at all material times acting only as a director of DASB. The matter, it was averred, was pending police investigations because a police report had been lodged with the relevant authorities. It was averred that the evidence adduced before this court disclosed a *prima facie* case of a conspiracy and or collusion by the defendants in the counterclaim to defraud Tiara in the counterclaim together with Yayasan Selangor. It was averred that the key person in the whole scheme was TKS. It was also averred that TKS had compounded the matter further by further misrepresentations, suppression of evidence and adopting a deliberate stand to mislead the court. Again, it was said that directors can be held personally liable for acts and omissions. Finally, it was averred that TKS's application to strike out the counterclaim was an abuse of process of the court and Tiara prayed that the application of TKS be dismissed with costs on a solicitor and client basis.

TKS's second affidavit in support of encl. 18 as seen in encl. 23 must now be examined. In encl. 23, TKS denied suppressing any crucial evidence as alleged by Tiara. TKS reiterated that the transaction of the MBf loan and its operation were strictly matters between MBf Finance Bhd and Puncakdana and it was averred that TKS had no control whatsoever over the transaction involving the drawdown of the monies. TKS too averred that in his capacity as a director of DASB and not in his personal capacity, he had signed relevant documents in respect to the MBf loan when requested by Puncakdana for the drawdown of the money which was basically for the benefit of Puncakdana and in doing so TKS had fulfilled DASB's obligations. Enclosure 23 was drafted in such a fashion as to whittle down all the allegations of Tiara and it was in line with the defence to the counterclaim. It was emphasised time and again that TKS had not acted in his personal capacity at any time and that all acts done were done for the benefit of DASB. It was also emphasised that Tiara's allegations were totally baseless and misconceived and that those allegations were meant to distort the actual issues and the facts before this court. For all these reasons, TKS prayed for an order in terms of his application in encl. 18.

## Counterclaim

The term "counterclaim" has been bandied about in this judgment and it is time to know its meaning. Order 15 r. 2 of the Rules of the High Court 1980 ("RHC") has this to say in regard to counterclaim:

> (1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.
>
> (2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.
>
> (3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.
>
> (4) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the Court may give judgment for the balance, so, however, that this provision shall not be taken as affecting the Court's discretion with respect to costs.

Order 15 r. 3 of the RHC further states that:

> (1) Where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject-matter of the counterclaim, or claim against such other person any relief relating to or connected with the original subject-matter of the action, then, subject to rule 5(2), he may join that other person as a party against whom the counterclaim is made.
>
> (2) Where a defendant joins a person as a party against whom he makes a counterclaim, he must add that person's name to the title of the action and serve on him a copy of the counterclaim; and a person on whom a copy of a counterclaim is served under this paragraph shall, if he is not already a party to the action, become a party to it as from the time of service with the same rights in respect of his defence to the counterclaim and otherwise as if he had been duly sued in the ordinary way by the party making the counterclaim.
>
> (3) A defendant who is required by paragraph (2) to serve a copy of the counterclaim made by him on any person who before service is already a party to the action must do so within the period within which, by virtue of Order 18 rule 2, he must serve on the plaintiff the defence to which the counterclaim is added.

(4) Where by virtue of paragraph (2) a copy of a counterclaim is required to be served on a person who is not already a party to the action, the following provisions of these rules, namely, Order 10 (except rule 1(4)), Orders 11 to 13 and order 70 rule 3, shall, subject to the last foregoing paragraph, apply in relation to the counterclaim and the proceedings arising from it as if –

(a) the counterclaim were a writ and the proceedings arising from it an action; and

(b) the party making the counterclaim were a plaintiff and the party against whom it is made a defendant in that action.

(5) A copy of a counterclaim required to be served on a person who is not already a party to the action must be indorsed with a notice, in Form 19, addressed to that person –

(a) stating the effect of Order 12 rule 1, as applied by paragraph(4); and

(b) stating that he may enter an appearance in Form 20 and explaining how he may do so.

A counterclaim is in fact a cross-claim (*Permodalan Plantation Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 160, 161). A counterclaim is unique. It may set up a cause of action that is accrued after the action was brought up and filed. A defendant who has any claim or who is entitled to any relief or remedy against the plaintiff in respect of practically everything, may, instead of filing a separate action, make a counterclaim in respect of it. But if the plaintiff has already obtained judgment against the defendant in the claim and the judgment has since been satisfied, then the defendant is barred from filing a counterclaim (*CSI International Co. Ltd v. Archway Personnel (Middle East) Ltd* [1980] 3 All ER 215, [1980] 1 WLR 1069, CA). In short, a counterclaim must be added to the defence and that counterclaim must specifically allude to the relief or remedy which the defendant is seeking. Once a defendant has filed a counterclaim against the plaintiff, the defendant may apply for summary judgment (O. 14 r. 5 of the RHC). The defendant too may apply for judgment in default of a defence to the counterclaim (O. 19 r. 8 of the RHC). Even the rules of pleading would apply to counterclaim and defence to counterclaim and they will be treated like as though they are respectively the statement of claim and the defence thereto (O. 18 r. 18 of the RHC). The defendant may certainly amend the counterclaim without leave of the court (O. 20 r. 3 of the RHC). Conversely, the counterclaim too can easily be withdrawn or discontinued without leave of the court (O. 21 r. 2(b) of the RHC). The rules as to payment into court apply equally to a counterclaim (O. 22 r. 6 of the RHC). By O. 28 r. 7 of the RHC, a counterclaim may be filed in an action begun by way of an originating summons.

Once the plaintiff is served with the sealed copy of the counterclaim, the plaintiff may apply to the court to have the counterclaim struck out or to be tried separately (O. 15 r. 5(2) of the RHC). The court certainly has the power to stay the *Counterclaim (Chuan Hup Agencies Pte Ltd v. Global Minerals (Sarawak) Sdn Bhd* [1990] 1 MLJ 305). As I said a counterclaim is quite unique and the uniqueness can be seen when a defendant can counterclaim against two plaintiffs jointly or even separately (*MS & LRy and L & NW Ry v. Brooks* (1877) 2 Ex D 243).

According to the case of *H Abdul Shukoor v. E Mohamed Kassim* [1927] SSLR 67, if the defendant has a *bona fide* counterclaim which appears to have and to contain some good grounds for argument and that counterclaim is connected to the subject matter of the plaintiff's claim, then leave to defend should be given to the plaintiff. Parker LJ in *Baylis Baxter v. Sabath* [1958] 2 All ER 209; [1958] 1 WLR 529, CA had occasion to say that:

> Where the Counterclaim amounts to an equitable set-off, it is only right that the judge should deal with the claim and cross-claim as one, and looked at in that way it seems to me that no valid distinction can be drawn between the way in which he should exercise his discretion in regard to the claim and in regard to the Counterclaim.

The late Pawan Ahmad J in *Lee Guat Eng v. Seet Tiam Hock* [1974] 1 MLJ 178 held, quite rightly, that where there was a plausible counterclaim upon the hearing of an O. 14 application, even if judgment was given to the plaintiff on his claim, there should be a stay of execution pending the trial of the counterclaim.

The case of *Beddall v. Maitland* [1881] 17 ChD 181 lays down an old principle of law that is worth repeating. It is this: that the defendant's counterclaim need not be "an action of the same nature as the original action." The counterclaim must be of such a nature that the court is empowered and have jurisdiction to entertain it as a separate action (*Bow Maclachlan & Co. v. The Camosun* [1909] AC 597; and *Williams v. Agius* [1914] AC 522). Bowen LJ in *Amon v. Bobbett* [1889] 22 QBD 548 aptly said that "A counterclaim is to be treated, for all purposes for which justice requires it to be so treated, as an independent action."

A defendant who has a claim against the plaintiff may make a counterclaim against the plaintiff instead of pursuing a separate cause of action. It is a time saving device and is an approach that has been lauded by many practitioners. Generally speaking, a separate cause of action involves additional expense, time and resources and certainly is less convenient to all concerned.

So much for the law on counterclaim. I will now proceed to examine the arguments of the parties.

TKS was not a party to any of the agreements and/or the transactions – giving rise to the doctrine of privity of contract read together with the issues of fraud, misrepresentation, conspiracy, lifting the veil of incorporation and the exposition of the relevant laws thereto Miss Chow Siew Lin, learned counsel for TKS, argued that Tiara's allegations in regard to the Puncakdana JV agreement and the Supplementary Puncakdana JV agreement were totally irrelevant because there was not a single agreement, be it oral or otherwise, between Puncakdana and TKS. In sharp contrast, Miss Toh Su Lin, learned counsel for Tiara, submitted that Tiara's counterclaim against TKS was not based solely upon the construction agreement or the Puncakdana JV agreement or the Supplementary Pundakdana JV agreement. There was according to her, *prima facie* evidence of fraud, collusion and misrepresentation inflicted upon or perpetrated against Tiara, whether directly or indirectly, and as a result of which Tiara had suffered substantial losses and damages. Miss Toh Su Lin highlighted the following set of facts.

(1) that all acts done by TKS were done as a director on behalf of and for the benefit of DASB;

(2) that the *modus operandi* of the fraud perpetrated by DASB and TKS and in collusion with Puncakdana had caused the drawdown of the sum of RM9 million under the said loan and this very drawdown was without the consent of Tiara; and

(3) Tiara alleged that Puncakdana had a dispute with DASB and TKS, and Puncakdana had accused TKS of fraudulent misrepresentation.

The arguments of the parties immediately put to the forefront the doctrine of privity of contract. Simply put, this doctrine means that only the original party to a contract may sue or be sued upon it. In other words, it is the original party that may enforce or be bound by the terms of the contract. While the doctrine of privity of contract denies the third party of any right, it also prevents the third party from being held liable under the contract to which the third party is not a party thereto. In *Price v. Easton* [1833] 4 B & Ad 433; and in *Tweddle v. Atkinson* [1861] 1B & S 393, the courts there laid down a singular principle of law to this effect: that no one may be entitled to or be bound by the terms of a contract to which he is not the original party thereto. But this basic principle of law has been watered down by the modern law of agency. In *MAA Holdings Sdn Bhd & Anor v. Ng Siew Wah & Ors* [1986] 1 MLJ 170 at 171, VC George J (as he then was) rightly observed that:

> It is not uncommon that in mercantile transactions one party acts as agent for an undisclosed principal. The law recognises that and the rights of the parties to a contract made by an agent of an undisclosed principal have been codified in ss. 183 to 186 of the Contracts Act. Section 184 goes to the extent of providing that the undisclosed principal may require the performance of the contract even though the other party to the contract neither knew or had reason to suspect that the person he had dealt with was in fact an agent.

and this brings to the forefront the doctrine of undisclosed principal (*Mohamed Din bin Ali v. The Trustees of the Negri Sembilan Scholarship Fund for Higher Education and Training of Malays* [1958] 24 MLJ 19; *Inter-Ocean Trading (Pte) Ltd v. Selco (Singapore) (Pte) Ltd* [1983] 1 CLJ 105; *Tara Rajaratnam v. Datuk Jagindar Singh & Ors.* [1983] 2 MLJ 127 at 134-135, [1984] 1 MLJ 175 at 181 which was affirmed on appeal *vide* [1986] 1 MLJ 105; and *Ye Yu @ Ye Kim Onn v. Joseph Raymond Morais* [1984] 2 CLJ 126). By way of an illustration, the doctrine of undisclosed principal may be set out in this way: If Ali has made a contract with Bala, Chan may intervene and take Ali's place if Chan can show that Ali was acting throughout as his agent, and it is irrelevant that Bala entered into the contract in ignorance of this fact. It can easily be discerned that the doctrine of undisclosed principal runs counter to the common law doctrine of privity. In the context of the present appeal, the doctrine of undisclosed principal was not advanced nor ventilated by the parties at all. It was a wise move since TKS acted in his capacity as a director on behalf and solely for the benefit of DASB. In *Kepong Prospecting Ltd v. Schmidt* [1968] 1 MLJ 170, Lord Wilberforce delivering the judgment of the Board of the Privy Council remarked at p. 174 of the report in regard to the applicability of the doctrine of privity of contract in these fine words:

> Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law. It is true that section 2(d) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue.

The case of *Tweddle v. Atkinson (supra)* refined the doctrine of privity of contract to its present form. In that case *John Tweddle* and *William Guy* each agreed to pay a sum of money to the plaintiff (Tweddle's son) in consideration of his marrying Guy's daughter. Guy failed to pay and the plaintiff sought to

enforce his promise against Guy's executor. It was held that the son could not enforce the promise despite the fact that the contract was for his benefit since he had given no consideration for it. Wightman J in the course of his judgment had this to say:

> It is now established that no stranger to the consideration can take advantage of a contract although made for his benefit.

Lord Haldane LC in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co. Ltd* [1915] AC 847, 853 in clear language approved the doctrine of privity of contract and this was what his Lordship said:

> In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.

It appears to me that Lord Haldane treated the privity doctrine and the rule that consideration must actually move from the promisee as two separate principles – Lord Haldane's treatment of the subject may produce the same result as the case of *Tweddle v. Atkinson (supra)* but it may not be so where the promise is made to more than one person and the consideration is provided for by only one of these promisees.

I will pause here for a moment. I take stock of the factual matrix of the appeal especially the role of TKS as a director of DASB. Siti Norma Yaakob JCA in *Abdul Manaf Mohd bin Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661 had occasion to consider the all pervasive issue of whether an agreement executed by the directors would make them personally liable and this was what her Ladyship had to say at p. 668 of the report:

> There are two limbs of liability which all the 14 appellants have attached to the second and third respondents. The first is the recovery of the balance of the purchase price under the agreement.
>
> The fact that the agreement was executed by the second and third respondents as directors of Nusantara Timur does not make the second and third respondents personally liable for the balance of the purchase price. The liability for such payment under the agreement is solely Nusantara Timur's, the contracting party. We can do no better than to quote the trial judge's reasoning on this:
>
> > A company incorporated under the Companies Act 1965 has its own separate legal entity, distinct from its members and officers. It can sue and be sued in its own name and, being an artificial person, it can only

> act through its directors and officers. It enters into an agreement through its directors and authorized officers. A director or an authorized officer of a company who executes an agreement on its behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless there are express provisions in the agreement or other document to the contrary making the director or officer personally liable for the breaches or acts of the company.

> There is also a finding by the trial judge that there is no evidence both oral and documentary to establish that the second and third respondents had held themselves out to be personally liable for the balance of the purchase price. There is no reason why we should not accept this finding and in any event, Mr Periasamy, learned counsel for the appellants, did not make any submission on this point.

and flowing from this, TKS was obviously not personally liable for the breaches by DASB, if at all that breaches were to exist. Tiara had in its counterclaim cited DASB and that being the case Tiara had no cause of action against TKS in his personal capacity. Section 132(1) of the Companies Act 1965 enacts that:

> A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

A director too must exercise his discretion *bona fide* in what he considers to be in the interests of the company (*Re Smith & Fawcett Ltd* [1942] Ch 304, 306). A director who deliberately acts contrary to the company's interests is said to act in a manner which is not *bona fide* (*Marchesi v. Barnes* [1970] VR 434, 438). Thus, the primary duty of a director is to act in the interests of the company of which he is a director. The test to adopt as enunciated by the Singapore's Court of Appeal in the case of *Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313, 325 would be: whether "an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the (company)." It is implicit in the duty to act honestly to also act in the best interests of the company. The court in *Lim Koei Ing v. Pan Asia Shipyard & Engineering Co Pte Ltd* [1995] 1 SLR 499, 509 was of the view that "a director must not put himself in a position where his duty and interest conflict; nor must he use the powers and assets entrusted to him for improper purposes." A director too must exercise reasonable diligence (*Byrne v. Baker* [1964] VR 443, 450, 451; and *Straits & Island General Insurance Sdn Bhd v. Lawrence Chung Hee Menn* [1991] 2 CLJ 1024, 1028) but there is no necessity for the director to exhibit any skill or be careful when carrying out his duties. Section 132(5) of the Companies Act 1965 enacts that:

> This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

and in essence it preserves the common law duty of care. It was rightly held in *Re City Equitable Fire Insurance Co* [1924] All ER Rep 485 to the effect that a person need not display nor exhibit a greater degree of skill than may reasonably be expected of a person of his knowledge and experience. A director owes a duty of care not to cause loss to the company by an act of negligence. It is indeed onerous to be a director of a company because as a director the individual is considered to be the agent of a company for the purpose of imputing criminal breach of trust under s. 409 of the Penal Code. For this proposition an array of authorities may be cited. For starters, the following authorities would suffice: *Tay Choo Wah v. PP* [1976] 2 MLJ 95; *Tan Sri Tan Hian Tsin v. PP* [1979] 1 MLJ 73; *Chang Lee Swee v. PP* [1985] 1 MLJ 75 and *Lai Ah Kau & Anor v. PP* [1988] 3 MLJ 391. Now, as a director of DASB, TKS duties and liabilities are governed by s. 132(1) of the Companies Act 1965 but it certainly cannot extend beyond the parameters as set out therein. To say that TKS was personally liable for the breaches by DASB would be stretching the law too far especially when TKS was not a party to any of the agreements alluded to somewhere in this judgment. Incidentally, s. 354 of the Companies Act 1965 gives the court the necessary power to relieve directors from the consequences of their negligence, default, breach of duty or breach of trust. But there was no necessity for me to invoke s. 354 of the Companies Act 1965 because TKS was not guilty of those defaults. The cases of *Re Duomatic Ltd* [1969] 2 Ch 365, 375; and *Re Ena Jainab Abdeen* [1930] SSLR 212, 216 categorically laid down the requirements before the court could relieve directors under s. 354 of the Companies Act 1965 and these requirements may be stated in these terms:

(1) that the director has acted honestly;

(2) reasonably; and

(3) so it is fair to excuse the director having regard, always, to all the circumstances of the case.

Not to be outwitted, Miss Toh Su Lin for Tiara submitted that TKS can be held personally liable for the acts of DASB and she cited an array of authorities. I am constrained to refer to those authorities. In *Aspatra Sdn Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97, the headnote at p. 98 was relied upon and it was phrased as such:

> The court could generally lift the corporate veil in order to do justice particularly where an element of fraud is involved. There was admittedly an element of fraud in the receipt of the secret profits alleged in this case and this was sufficient for the court to lift the corporate veil for the purpose of determining whether the assets of the company were really owned by them.

but factually, Aspatra are poles apart from the present appeal. That was a case where an action was instituted against the director of a bank for the return of secret profits and, consequently, the corporate veil was lifted whereas there was no allegation that TKS had made secret profits from DASB.

In *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 FC, Chong Siew Fai CJ (Sabah & Sarawak) (as he then was) said at p. 536 to p. 537 of the report:

> Peeping behind the veil is to enable the Court to obtain information on certain features of the company, for example, its composition, type (holding, subsidiary etc.), proportion of shareholdings, control etc. Having obtained this information, the Court will examine it and then decide whether to adjudicate on the company alone or to move up the ladder of lifting the veil, to more serious repercussions. In our instant case, it was an undisputed fact that the subsidiary was wholly owned by the holding company, and it had not been challenged that holding company by proxy, through its nominees, managed the subsidiary. Thus the composition, type, shareholding and control of the subsidiary stood in front of the veil, and there was no need to lift the veil to unveil them.

and it was said in the context of restraining a holding company from disposing of the assets of the subsidiary. Sunrise was a case where separate personalities of the companies were being used to enable certain persons to evade their contractual obligations or duties whereas in the present appeal there was no necessity to pierce and cut open the corporate veil because TKS was not privy to those agreements. Next, it would be the case of *Hock Hua Bank (Sabah) Bhd v. Lam Tat Ming & Ors* [1995] 4 MLJ 328 where the court there held that an element of fraud was involved and in order to do justice, the corporate veil was lifted. The defendants in Hock Hua Bank (Sabah) Berhad had caused loss of the plaintiff's money by fraud and had benefited from it. The improper way in which the cheques were treated was not according to an "established banking procedure" and as the rightful owner of the money Hock Hua Bank had sued for its return. In sharp contrast, in the present appeal MBf Finance Bhd did not file a suit against the drawdown of the sum of RM9 million. It must be borne in mind that DASB had given its consent for the drawdown upon request by Puncakdana and this was supported by the relevant documents – entirely in accordance with the agreements. The totality of the evidence, seen in its correct perspective, showed that Tiara had failed to prove the element

of fraud on the part of TKS. Tiara too failed to show that it was entitled to the sum of RM9 million. All said and done, the facts in Hock Hua Bank can readily be distinguished. In *Wallersteiner v. Moir, Moir v. Wallersteiner and Others* [1974] 3 All ER 217, Lord Denning at p. 238 of the report said:

> Even so, I am quite clear that they were just the puppets of Dr Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures – for whose doings he should be, and is, responsible. At any rate, it was up to him to show that any one else had a say in their affairs and he never did so: *c f Gilford Motor Co Ltd v. Horne* [1933] 1 Ch 935 at 943, 957.

and his Lordship continued at p. 239 of the report in serious vein:

> and that Dr Wallersteiner was the moving spirit behind it.

and using Wallersteiner as a leverage, Miss Toh Su Lin submitted that there was a strong and cogent *prima facie* evidence that fraud had been committed against Tiara pursuant to the collusion between DASB and Puncakdana. It was also submitted that TKS was instrumental in perpetrating the fraud and it appeared that TKS, so the submission went, was responsible and played a pivotal role in orchestrating the fraud. It was submitted that TKS was just like Dr. Wallersteiner and, consequently, Tiara had a cause of action against TKS in his personal capacity. It was emphasised on behalf of Tiara that the doctrine of privity of contract has no application at all to the present appeal. Incidentally, Wallersteiner was in regard to a loan that was advanced to a company that was wholly owned and controlled by the director and clearly it was different from the facts of the present appeal.

Lifting the veil of incorporation is the surest way of ascertaining the main players of the company. Courts generally will be reluctant to pierce the veil of incorporation. There are no hard and fast rules governing the lifting of the veil. It varies from case to case and according to the circumstances of each case (echoing the speech of Mohd Azmi SCJ in *Aspatra Sdn Bhd v. Lorrain Esme Osman* [1988] 1 MLJ 97, 103). Malaysian courts have been very magnanimous in lifting the veil in so far as a group enterprise is concerned unlike the Australian court in *Pioneer Concrete Services Ltd v. Yelnah Pty Ltd* [1986] 11 ACLR 108 a decision of the Supreme Court of New South Wales, and also unlike the New Zealand court in the case of *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136, 158-159. It would purely be a matter of discretion whether to lift a corporate veil. That discretion would certainly be

exercised in favour of piercing the veil when it is apparent from the available evidence that the company has been used as a device to mask the carrying out of a business where an individual could not possibly do (*Gilford Motor Co Ltd v. Horne* [1933] Ch 935). Piercing the veil would also be exercised when an individual in order to avoid his contractual obligation conveniently sells the subject matter of the contract to a company which is controlled by him (*Jones v. Lipman* [1962] 1 WLR 832). Where the justice of the case requires that the veil ought to be lifted, the court has been quick to unveil and to see the kingpin behind the whole façade (*Tengku Abdullah ibni Sultan Abu Bakar v. Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265 CA). In *Tan Guan Eng v. Ng Kweng Hee* [1992] 1 MLJ 487, Edgar Joseph Jr J held that there was a *prima facie* case and his Lordship then proceeded to pierce the veil to enforce the members' rights.

Now, the pertinent question to pose would be this: should the veil of incorporation of DASB be lifted? For this exercise, I must recount the facts. TKS was not involved and was not a party to any of the Agreements as alluded to in this judgment. That being the case, TKS cannot determine the terms or the manner of carrying out those agreements. DASB had, upon the request by Puncakdana, executed all the documents including the granting of its consent for the drawdown of the money under the said loan in accordance with the Puncakdana JV agreement and thus fulfilling its obligations thereunder. At the same time, TKS too had executed all the documents for and on behalf of DASB in the course of carrying out DASB's obligations under the Puncakdana JV agreement.

The parties to the MBf loan were Puncakdana and MBf Finance Bhd. It was therefore apparent that TKS had no say nor control over the manner in which the MBf loan was operated. There was thus no necessity to lift the veil of incorporation of DASB. At any rate, even if the drawdown of RM9 million was unlawful, it was for MBf Finance Bhd to pursue the matter. Tiara who was not the lender nor the borrower under the MBf loan was obviously not entitled to bring a claim for the sum of RM9 million, which sum Tiara was not entitled to in the first place.

Bare allegations were advanced by Tiara in regard to the issues of fraud and fraudulent misrepresentation. Tiara too failed to show how TKS orchestrated the alleged fraud and the fraudulent misrepresentation. In *See Hua Daily News Bhd v. Tan Thien Chin & Ors* [1986] 2 MLJ 107 SC, Mohamed Azmi SC (as he then was) in dismissing the appeal, had this to say at p. 110 of the report:

> His existence and participation were introduced by the appellants at the trial. In such a situation, how could there be fraud on the respondents' part? Perhaps the appellants had made a mistake in making the admissions as contained in the public apology. But they have alleged fraud and not mistake. Thus, even on its very face the alleged fraud is clearly frivolous and vexatious. The nature of the alleged fraud is such that it cannot have been made bona fide. Since the burden of providing the existence of the triable issue is on the appellants, it is the more reason that they must condescend to particulars of the alleged fraud in their affidavits. In the absence of particularization we must, on the authority of *Wallinford* case [1880] 5 App. Cas. 685, 704 agree with the learned trial judge that the affidavits of Mr. Lin are insufficient to raise a triable issue on fraud.

and although this was a case that went up on appeal to the then Supreme Court, the allegation of fraud in that case was held to be frivolous. Shaik Daud JCA in *Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 MLJ 62 applied generously the case of *See Hua Daily News Bhd v. Tan Tien Chin & Ors (supra)* and at p. 71 of the report, his Lordship Shaik Daud JCA said:

> In *Cannock Chase District Council v. Kelly* [1978] 1 All ER 152; [1978] 21 WLR 1, in considering an allegation of bad faith on the part of a local authority by a tenant of its house who had been given a notice to quit, the court of Appeal held that [1978] 1 WLR 1 at p. 6:
>
> > If a charge of bad faith is made against a local authority, they are entitled … to have it properly particularized. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularized, the pleading may be struck out.
> >
> > This principle should apply with greater force in cases of allegations of a conspiracy or fraud: In *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107, the Supreme Court in considering allegations of fraud, held that 'the failure of the appellants to condescend upon particulars of the fraud in their affidavits is fatal'. It seems clear that on the authorities, a mere general allegation of fraud is not sufficient, and the party making the allegation is required to condescend to particulars. The same principle applies to allegations of conspiracy. After giving my serious consideration, I am of the view that what the defendants succeeded in raising at best is a mere suspicion, and this certainly is not sufficient. The learned judge was, therefore, right in ordering summary judgment, and I find no merits in the present appeal and, therefore, dismissed it with costs here and in the court below.

Although Ng Ah Ba was a case which pivoted on the summary judgment which the trial judge gave to the respondent, yet the principles of law enunciated in that case are germane and of general application. It must be

borne in mind that s. 10 of the Contracts Act, 1950 enacts, *inter alia*, that all agreements are contracts if they are made by the free consent of the parties. According to s. 14 of the Contracts Act, 1950, "Consent is said to be free when it is not caused by –

(a) coercion, as defined in s. 15;

(b) undue influence, as defined in s. 16;

(c) fraud, as defined in s. 17;

(d) misrepresentation, as defined in s. 18; or

(e) mistake, subject to ss. 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake".

I will now highlight fraud and misrepresentation. Section 17 of the Contracts Act, 1950 defines fraud in this manner:

> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent.
>
> Explanation – Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.
>
> ILLUSTRATIONS
>
> (a) A sells, by auction, to B, a horse which A knows to be unsound.
>
> A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A, 'if you do not deny it, I shall assume that the horse is sound.' A says nothing. Here, A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B."

It is a correct statement of the law to say and I so say that whenever a person causes another to act on a false representation which the maker himself does not believe to be true, the maker is said to have committed a fraud. It is a simple statement of the law. The case of *Derry v. Peek* [1889] 14 App Cas 337 is a classic example of fraud under the common law where the House of Lords in classical style defined fraud as a false representation "made (i) knowingly or (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false." A high standard of proof is required where fraud is alleged (*Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1986] 1 MLJ 105).

Misrepresentation, on the other hand, is defined in s. 18 of the Contracts Act, 1950 in this way:

'Misrepresentation' includes –

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

and it appears to cover varied situations or circumstances as understood at common law. There is a distinct difference between fraud and misrepresentation. It is this. In fraud, the person making the representation does not himself believe in its truth. Whereas in the case of a misrepresentation, the person making the representation may believe the representation to be true. Just like fraud, silence too in certain situations especially where there is a duty to disclose may amount to a misrepresentation under s. 18(b) of the Contracts Act 1950. All these general principles of law are so trite that its repetition has become common place. Be that as it may, in regard to Tiara's allegation of conspiracy by all the defendants, it was submitted on behalf of TKS that

Tiara had failed in all respects to plead in its Counterclaim and/or to prove its case for conspiracy notwithstanding that the word "conspiracy" appeared in the affidavit in encl. 20. This was indeed a correct submission fit to be advanced for this appeal. Moreover, TKS had categorically denied conspiring with any party to injure Tiara in its business ventures. The court in *Lum Sow Kuen v. Chuah Choong Heong & Ors* [1998] MLJ 39 sets out the principles governing conspiracy in this way:

> From the leading cases on the law of conspiracy, namely *Lonrho v. Shell* [1981] 2 All ER 456, *Lonrho v. Fayed* [1991] 3 AER 303, *Aik Ming (supra*) and *Seagate Technology Pte Ltd & Anor v. Heng Eng Li & Anor* [1994] 1 SLR 534 and affirmed by the Singapore Court of Appeal on the issue of conspiracy and reported in [1995] 1 SLR 17 at 23-26 and the commentary in *Clerk & Lindsell on Torts* (17th Ed) (1995) pages 1267-1287, the following principles can be distilled:
>
> (1) There are two ways in which the tort of conspiracy can be committed, ie, two or more persons pursuant to an agreement or arrangement combine –
>
> (a) to injure a plaintiff by lawful means and cause him economic loss (the unlawful purpose or lawful means conspiracy); and
>
> (b) to commit an unlawful act and cause the plaintiff economic loss by that unlawful act (the unlawful means conspiracy).
>
> (2) It is essential to prove the agreement or arrangement, intention and the actual injury.
>
> (3) In the lawful means conspiracy, the plaintiff must prove that the sole or predominant purpose of the conspiracy is to injure the plaintiff.
>
> (4) If the predominant purpose of the defendants is to protect or advance their own self-interest, even though damage to the plaintiff is an unintended consequence, it is not actionable.
>
> (5) The lawful acts or unlawful means for purposes of the tort may be crimes or torts or breaches of statutory provisions.
>
> (6) The burden of proving the existence of an agreement or arrangement among the defendants is on the plaintiff and a high degree of proof is required.
>
> From the above-distilled principles and applying the same in respect of the 4th defendant the plaintiff must prove that there was an agreement or arrangement among the defendants to carry out an overt act. I find that no such agreement or arrangement has been pleaded or proved.

As was said by Gopal Sri Ram in MGG Pillai *(supra)* at page 515 with regard to evidence in proof of a conspiracy:

> It is axiomatic that there must be proof and not mere conjecture.

I find that the plaintiff has failed to prove her case against the 4th defendant.

and applying these passages to the present appeal, it was my judgment that there was no "agreement or arrangement among the defendants to carry out an overt act" detrimental to Tiara. Just like fraud, conspiracy too must be particularised in the counterclaim so that the opposite party would not be caught off guard. Incidentally, in Tiara's affidavits the particulars of conspiracy were not intemised at all. There are passages in the case of *Hock Hua Bank (Sabah) Bhd v. Lam Tat Ming (supra)* that merit reproduction. At pp. 360 to 361 of the report, the following germane passages appear:

> What is a conspiracy? The Federal Court in *Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors* [1979] 1 MLJ 71, 72, approved the following definition of conspiracy of *Clerk and Lindsell on Torts* (13th Ed) p. 817, viz:
>
> > A conspiracy consists … in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.
>
> 45 *Halsbury's Laws of England* (4th Ed) at para 1527, states that the essential ingredients of conspiracy are (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in damage to the plaintiff. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose though it is not necessary that each conspirator should have been in communications with each other (11 *Halsbury's Laws* (4th Ed) para 58).

Reverting back to the judgment of Shaik Daud JCA in *Ng Ah Ba & Ors v. Ramanda Sdn Bhd (supra)*, particularly at p. 70 to p. 71 of the report, his Lordship in fine language said:

> Based on the evidence both in affidavits and documentary, the learned judge made a specific finding that there was no basis for the matter to go for trial. I am entirely in agreement with that finding. This court, sitting in an appellate capacity, can find no reason to interfere with that finding. One aspect of the matter appears not to have been considered by the learned judge, but in the light of his finding, it makes no difference, and that is the question of general allegation of conspiracy advanced by the defendants. On my perusal of the

> statement of defence, it seems that the defendant merely made a bare and general allegation of the conspiracy. In the statement of defence, they claimed that the so-called conspiracy was entered into between the manager of the plaintiff, the first defendant and one Mr Cheong Wai Meng. Neither the name nor the identity of the plaintiff's manager has been disclosed in their affidavits-in-reply, nor has it been revealed the role played by the manager. Most important of all, I find that no particulars of the alleged conspiracy has been disclosed in their affidavits. The first defendant in his affidavit had categorically denied the allegation of conspiracy, and has sufficiently explained the circumstances heavily relied upon by the defendants in support of their allegation, which explanation found favour with the learned judge. What the defendants (sought) to do was merely make sweeping and general allegations of the alleged conspiracy without alluding to any particulars. The authorities are clear on general allegations of fraud, and they are equally applicable to such allegations of conspiracy.

In equal style, Gopal Sri Ram JCA in *Ng Ah Ba & Ors v. Ramanda Sdn Bhd (supra)* said at p. 78 of the report:

> On the totality of all the evidence presented before the learned judge, I am satisfied that the allegation of a conspiracy to fraud is altogether frivolous and made without any basis. Practitioners must remember that taking a plea of fraud is a serious matter and that no such plea ought to be put on the record in the absence of sufficient material in support.

In my judgment, Tiara failed not only to plead but also to prove how the defendants had conspired among themselves to intentionally injure Tiara. There was also a failure to show how Tiara had suffered as a result thereof.

In the Counterclaim, Tiara did not particularise the conspiracy and in the words of Gopal Sri Ram JCA in *Ng Ah Ba & Ors v. Ramanda Sdn Bhd (supra)* such "allegation of a conspiracy to defraud" was "altogether frivolous and made without any basis" whatsoever. Indeed as Shaik Daud JCA said in *Ng Ah Ba & Ors v. Ramanda Sdn Bhd (supra)* "at best" it was "a mere suspicion, and this certainly" was "not sufficient." Parties must surely be bound by their pleadings. In this context, Gopal Sri Ram JCA in *Ng Ah Ba & Ors v. Ramanda Sdn Bhd (supra)* aptly said at p. 77 to p. 78 of the report:

> Secondly, neither in the defence nor in the affidavit in opposition are there any particulars of the alleged fraud or conspiracy. It is of no consequence that the defence does not condescend to particulars. After all, this was an application under the summary jurisdiction so that there was no obligation on the part of the appellants to even deliver a defence. But the affidavit must do so. The strictness with which this rule as to pleading has to be observed, even in cases coming within the summary procedure, is demonstrated by the decisions in

*Cannock Chase District Council v. Kelly* [1978] 1 All ER 152; [1978] 1 WLR 1, and *See Hua Daily News Bhd v. Tan Thien Chin* [1986] 2 MLJ 107. In the latter case, Mohamed Azmi SCJ when dealing with a charge of fraud raised by a defendant in an application under O. 14 said at p. 111:

> Having regard to the factual situation in this case, we see no reason to disturb the finding of the learned judge that the allegation of fraud is not only frivolous but also not *bona fide*. The reasons given by the learned judge for coming to this conclusion are well founded. **Firstly, the failure of the appellants to condescend upon particulars of the fraud in their affidavits is fatal**. (Emphasis added.)

I think that his Lordship's words are apposite to the present case. Here too, it would appear that the charge of conspiracy to defraud is not made *bona fide*, and that there are certainly no particulars in support of it.

I must reiterate that the laws relating to pleadings are settled and well documented by learned judges before me. In *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196, the late Sharma J observed:

> It should be realised that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. No such issue arose on the pleadings. A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

His Lordship continued further at page 197 of the report in these words:

> It was held by Scrutton L.J. in the case of *Blay v. Pollard & Morris* [1930] 1 K.B. 628 at p. 634:
>
> > Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In

> the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v. Sakiman* [1956] MLJ 45 where Sir Charles Mathew CJ said:

> I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.

> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected.

Raja Azlan Shah FJ (as His Majesty then was) in *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157 FC, aptly said at p. 159 of the report:

> Now the function of pleadings is to give fair notice of the case which is to be made so that the opposing party may direct his evidence to the issue disclosed by them. See *Esso Petroleum Co Ltd. v. Southport Corporation* [1956] AC 218, 238.

and His Majesty then continued in perfect language that went straight to the heart of the matter:

> In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.

> An erroneous direction on the pleadings is ground for ordering a new trial. That is the result of two earlier decisions in which the effect of an erroneous ruling as to the issues raised in the pleadings was the point under consideration. See *Haji Mohamed Dom v. Sukiman* [1956] M.L.J. 45; *Khiaw Aik Heng Co. Ltd. v. Tan Tien Choy* [1964] MLJ 99. Since the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and a new trial ordered.

Miss Toh Su Lin for Tiara raised the issue of Tiara's fiduciary duty to Yayasan Selangor. With respect, this issue was not pleaded in Tiara's counterclaim and that being the case it will not be considered by this court. In my judgment, Tiara had not proved what it was claiming for under the

counterclaim. Tiara's personal claim for damages had nothing to do with the sum of RM9 million drawdown under the said loan because, in the first place, Tiara was not entitled to that sum. It must be borne in mind that Yayasan Selangor had terminated the agreement with Tiara and had revoked the power of attorney. That power of attorney that was dated 7 March 1995 did not authorise Tiara to initiate any action or proceeding. Simply put, it was a matter of a bare allegation. Tiara had not proved that the sum of RM9 million had been used for purposes otherwise than for the development of the property. It would be germane to mention that neither Yayasan Selangor nor MBf Finance Bhd (who is the registered proprietor of block "C" and the lender of the said loan) had pursued the matter in regard to the drawdown of the sum of RM 9 million. This was my judgment and I so hold accordingly.

**Striking Out Under O. 18 r. 19 Of The RHC**

The relevant law on striking out may be stated as follows:

(1) Only in plain and obvious cases that the exercise of the power to strike out an action should be exercised (*Drummond-Jackson v. British Medical Association* [1970] 1 All ER 1094; *Lee Nyen Choi v. Voon Noon* [1979] 2 MLJ 28; *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207; and *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 PC).

(2) In *Pengiran Othman Shah bin Pengiran Mohd Yusoff v. Karambunai Resorts Sdn Bhd* [1996] 1 MLJ 309, 320-321, Siti Norma Yaakob JCA succinctly laid down the law in these fine words:

> The discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1.) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mckay & Anor v Essex Area Health Autghority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890.)
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> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v. Mohd*

*Ismail & Ors* [1992] 1 MLJ 400.) Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

(3) In *Suppuletchimi v. Palmco Bina Sdn Bhd* [1994] 2 MLJ 368, Vincent Ng J at p. 381 to p. 382 of the report observed:

> Be it noted that even the Privy Council decision in *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 does not preclude the court from examination of affidavit evidence, as their Lordships in that panel only said that they would be loth (disinclined rather than precluded) to differ from the opinion of the Federal Court (as it then was) had the matter depended upon the contents of the statement of claim alone (*ie*, an application under O. 18 r. 19(1)(a)). But in no uncertain terms, the decision enjoins the court to submit affidavit evidence to critical examination to determine whether the action (or defence) could not possibly succeed. Lord Diplock in delivering the judgment of the Board had this to say [at p 1 col 2C-F]:
>
> > The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the statement of claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the statement of claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the new action could not possibly succeed.

I recognize that a trial on affidavits would be clearly wrong. See *Pertama Malaysia Finance Bhd v. Konrep Services Sdn Bhd & Ors* [1990] 1 CLJ 127. But in an application under O. 18 r. 19 or O. 14, it is still incumbent upon the court to determine whether issues could more appropriately have been decided, without the expense of a full trial with witnesses and expenditure of the courts' invaluable time. No party in a proceeding is entitled to require the court to accord them valuable time of several days open court viva voce trial only upon mere or bare assertions in their affidavits. Though, nevertheless, it is essential that affidavits in such applications filed should be confined to

matters pleaded and not go beyond prima facie evidence of such matters pleaded.

The crucial question the court would have to ask itself in applications under O. 14 or O. 18 r. 19(1)(a)-(d) is first, whether the piece or pieces of evidence essential to make out a reasonable prima facie cause of action or a prima facie triable issue of fact are of the nature such that they are adduceable by affidavit evidence; and secondly – if the answer to this question is in the positive – whether such essential *prima facie* evidence had been so adduced in the supporting affidavits. Such affidavits ought not to contain bare averments but must condescend or come definitely into particulars for serious argument such that they are sufficient to satisfy the court that there is a reasonable prima facie cause of action or a triable issue or issues of fact or law in the defence as the case may be.

In the essence, *prima facie* evidence which is capable of being adduced by affidavit evidence ought to be so adduced even in summary proceedings. And due to the probable finality of the decision in such applications and in order to better consider the issues, an application before the hearing by the respondent for a short adjournment to file a supplementary affidavit should normally be allowed in the interests of justice.

Thus, O. 18 proceedings whether they be under r. 19(a), (b) or (c) – and for that matter also O. 14 proceedings as well – are not decided by weighing mere assertions in the affidavits of both the parties. It is trite that the mere assertion in an affidavit of a given situation which is to be the basis of a claim or a defence, does not *ipso facto* provide immunity against the claim or defence from being struck out under r. 19(a), (b) or (c), (or leave to defend refused in an O. 14 matter); the court must and ought to look at the whole situation and ask itself whether the plaintiff (in an application to strike off a claim) has satisfied the court that he has a *bona fide* or *prima facie* cause of action, and the defendants (in an application to strike off the defence) have not only raised an issue but also that the issue is, *prima facie*, triable. The defendants have to make out a good *prima facie* defence only if the plaintiff's case is also *prima facie* a good one. See *Saw v. Hakim* [1888] 5 TLR 72.

(4) The court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton LJ in *Dyson v. Attorney-General* [1911] 1 KB 419).

(5) Striking out is a discretionary jurisdiction which should be exercised in the context of the circumstances of the case (*Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No 3)* [1970] Ch 506, [1969] 3 WLR 991). Thus, the court in *Salomons v. Knight* 8 TLR 472 not only struck out the defence but also proceeded to grant the plaintiff an injunction.

Now, when applying the foregoing principles to Tiara's counterclaim and the affidavits thereto, it was quite plain and quite obvious that Tiara had failed to make out a *prima facie* case. The exhibits in encls. 19 and 20 were illustrative of assertions that were inconsistent with the undisputed contemporary documents or were inherently improbable by itself. In my judgment, TKS had demonstrated conclusively from the relevant affidavits and the supporting documents thereto that Tiara's allegations were mischievous, irrelevant and totally unsustainable against TKS. The upshot of it all was this: that the appeal in encl. 29 should be allowed in favour of TKS. This meant that:

(a) the counterclaim of Tiara against TKS dated 22 March 1999 be struck out;

(b) the costs of the application in encl. 18 and the costs of TKS for defending Tiara's counterclaim should forthwith be paid by Tiara to TKS; and

(c) the costs of the appeal in encl. 29 should rightly go to TKS.